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In The

Supreme Court of the United States

October Term, 1990

WILLIAM M. BENNETT; CONWAY H. COLLIS; ERNEST J. DRONENBURG, JR.; PAUL CARPENTER; GRAY DAVIS; CINDY RAMBO; JOHN GIBBS; LUCIAN KHAN; SHIELA J. GUSTIN,

Petitioners,

v

DIRECT MARKETING ASSOCIATION, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General of
the State of California
TIMOTHY G. LADDISH
Assistant Attorney General
JAMES B. CUNEO,
Supervising Deputy
Attorney General

STEVEN J. GREEN
Deputy Attorney General
(Counsel of Record)
1515 K Street, Suite 511
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5157

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

1. In applying the Tax Injunction Act (28 U.S.C. § 1341) and the principle of comity which underlies the Act, to protect state taxation from federal court interference so long as plain, speedy and efficient state remedies are available, should the federal courts interpret the state's statutes as not providing any such remedy when the state's statutes and its case law are at least susceptible to the opposite conclusion?

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No. _____

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Petitioners,

v.

DIRECT MARKETING ASSOCIATION, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners William M. Bennett, et al., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on October 23, 1990.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported at 916 F.2d 1451, and is reprinted in the Appendix at pages A10-A25. The unpublished Memorandum Opinion of the United States District Court for the Eastern District of California is reprinted in the Appendix at pages A1-A7.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on October 23, 1990, and is reprinted at page A9. A timely petition for rehearing was denied on December 14, 1990, by order of the Court of Appeals filed December 14, 1990, which is reprinted at page A10. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS INVOLVED

Reference is made herein to 28 U.S.C. § 1341 and to sections 19, 6202, 6203, 6451, 6452, 6453, 6454, 6455, 6481, 6511, 6536, 6901, 6902, 6903, 6904, 6905, 6906, 6907, 6908, 6931, 6932, 6933, 6934, 6935, 6936, 6937, 18817, 19051, 19092 of the California Revenue and Taxation Code. The state statutes are reprinted in the Appendix at A26-A43.

28 U.S.C. § 1341 provides:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

STATEMENT OF THE CASE

The underlying action that is the subject of this petition was brought on August 24, 1988, by a trade association, the Direct Marketing Association ("DMA").[1] The majority of the members of DMA are mail order entities, located outside California, which accept mail or telephone orders for products and ship such products to their customers.

The petitioners are (or, at the time the complaint was filed, were) elected members, and officials, of the State Board of Equalization, State of California ("the Board"). The Board is charged with administration of California's sales and use tax laws.

In 1987, the California Legislature enacted amendments, effective January 1, 1988, to section 6203, of the California Revenue and Taxation Code, a provision within California's State Sales and Use Tax Law. Subsequent to the legislative action, the Board demanded that numerous DMA members, which accept credit cards issued by California financial institutions for sales to California customers, register with the Board as retailers engaged in business in California and "pay a use tax collected from every [California] person purchasing an

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[1] The facts, in large part, are taken from the opinions of the Court of Appeals and district court. There is no factual record as the Court of Appeals reversed the District Court's decision to grant, on the basis of the Tax Injunction Act, the petitioners' motion to dismiss.

item . . . unless a sales tax was previously paid . . . "[2] App. at A13.

The complaint in district court predicated subject matter jurisdiction upon 28 U.S.C. §§ 1331 and 1343(a)(4) (equitable and declaratory relief for alleged civil and constitutional rights violations pursuant to 42 U.S.C. § 1983 and also sought attorney's fees (42 U.S.C. § 1988)). DMA alleged that enforcement of California's use tax statutory scheme as to non-California DMA member retailers violated the Commerce Clause of the United States Constitution as well as the Due Process Clause of the Fourteenth Amendment.

The Board moved to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Specifically, the Board asserted that DMA lacked standing to bring the action on behalf of its members, that the Eleventh Amendment to the United States Constitution granted immunity from suit and that, pursuant to the Tax Injunction Act and principles of comity, the district court was barred from entertaining the case.

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[2] Although not entirely specified by the Court of Appeals, the requirements involve collecting use taxes from purchasers subject to the tax and providing a receipt therefore. (Cal. Rev. & Tax Code § 6203) Upon the giving of a receipt the consumer is absolved of the requirement to pay the tax to the state or to file tax returns as the duty then shifts to the retailer. (Cal. Rev. & Tax Code §§ 6202 and 6452) A use tax return required from such a retailer must reflect the total sales price of property subject to the tax, reflect the total sales for the period involved, and be accompanied by remittance of the amount of tax due. (Cal. Rev. & Tax Code §§ 6452, 6453, 6454.)

On April 25, 1989, the District Court, overruling the Board's Eleventh Amendment argument, and not reaching the standing issue, dismissed the action finding that the Tax Injunction Act divested it of jurisdiction. App. at A7. The district court found that "(b)ased on state case law, it is clear that the state scheme provides plaintiff's members with a plain speedy and efficient remedy in the State's courts." App. at A7.

Respondent appealed to the Ninth Circuit Court of Appeals which reversed the order of dismissal and remanded the matter for further proceedings.[3]

The Court of Appeals, focusing upon Cal. Rev. & Tax Code § 6902,[4] stated that "(s)ection 6902 thus provides **limitation periods** only for 'taxpayers' and those who have received 'determinations'." (emphasis added) The Court stated that since DMA members are neither taxpayers nor entities which have allegedly received determinations (described as an outstanding assessment), it is

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[3] The Court of Appeals, noting that the district court had not reached the Board's "standing" objection to jurisdiction, observed that in a similar context the issue should be dealt with in the first instance by the trial court. App. at A14 fn. 3. As of the filing of this petition with this Court, the district court has not decided the Board's motion to dismiss on the basis of respondent's alleged lack of standing.

[4] Cal. Rev. & Tax Code § 6902 sets forth **limitation periods for filing use tax refund claims**. As more fully discussed, infra, the statute neither limits the right, provided by Cal. Rev. & Tax Code §§ 6901 and 6937, of "persons" (not just "taxpayers") who pay use taxes to the state to receive refunds or judgments for amounts sought to be refunded, nor sets refund claim limitation periods only for "taxpayers" and recipients of "determinations."

sufficiently, for purposes of the Tax Injunction Act, uncertain whether they have an available state remedy. App. at A17.

The Court of Appeals concluded that the District Court should not have "disregarded DMA's argument that the existence of an outstanding assessment is critical to the right of a non-taxpayer to use the statutory claim for refund procedure" because in each case cited by the district court as reflecting the adequacy of a retailer's post-payment remedies, the retailer had received a determination from the Board. App. at A19-A20.

The Court of Appeals stated that for Tax Injunction Act purposes a refund scheme is inadequate if dependent upon the issuance of an assessment because assessments expose entities to penalties and interest and because whether an assessment will be issued becomes a matter of speculation. App. at A24. The Board relying upon sections 6901 and 6937 of the California Law, argued that the availability of the California remedies did not rest on whether an assessment had issued.

The Court of Appeals concluded that the Tax Injunction Act is not a bar to federal jurisdiction because "(t)he current statutory language, legislative history of the use tax statute, and interpretation of analogous refund provisions all make it sufficiently uncertain whether a retailer who voluntarily remits use taxes may file a refund claim under section 6902." App. at A25.

REASONS FOR GRANTING THE WRIT

I

IF LEFT UNDISTURBED THE COURT OF APPEALS DECISION MAY WELL WRECK HAVOC WITH CALIFORNIA'S USE TAX SCHEME BY INVITING PRE-PAYMENT FEDERAL INJUNCTIVE ACTIONS BASED UPON A COURT OF APPEALS DECISION WHICH IGNORED CONTROLLING CALIFORNIA TAX REFUND STATUTES IN PERMITTING A FACTUALLY AND LEGALLY UNSOUND AVOIDANCE OF THE TAX INJUNCTION ACT AND ITS UNDERLYING PRINCIPLE OF COMITY

A. The Court of Appeals' decision has vast economic and legal ramifications beyond the seemingly simple dispute between the Board and DMA.

The Ninth Circuit is tne Court of Appeals which has jurisdiction over each of the district courts in California. Any such district court which in the future addresses a retailer's injunctive challenge to California's use tax collection requirement, with a claim of no post-payment state remedy, will necessarily be bound by the Court of Appeals' decision.

The Ninth Circuit will be the appellate court deciding all appeals of California district court decisions regarding the adequacy of California's post-payment use tax remedies.[5] The Court of Appeals' decision will likely

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[5] See, for example, *Redding Ford v. California State Board of Equalization*, 722 F.2d 496, 497 (9th Cir. 1983), a decision addressing and upholding the adequacy of California's post-payment sales and use tax refund remedies in a situation where a retailer had received a determination for sales and use taxes.

govern future federal trial and appellate cases involving the applicability of the Tax Injunction Act to pre-payment challenges to an asserted requirement that a retailer collect California's use taxes.

In *National Geographic Soc. v. California Board of Equalization*, 430 U.S. 551, 555, 97 S.Ct. 1386 (1977), this Court had before it the challenge of National Geographic to the requirement by California that it register as a retailer, collect the state's use taxes from purchasers, and remit the same to the Board.[6] This Court observed that the constitutionality of use tax schemes is well settled and that all states that impose sales taxes impose a corollary use tax applicable to out-of-state purchases of tangible personal property. In fact, this Court noted the states with use tax schemes necessarily impose collection duties on the out-of-state retailer because of the obvious impracticality of the states' collecting the tax directly from individual purchasers. (*Id.*, at 555-56.)

Clearly, *National Geographic*, supra, and *Redding Ford*, supra, reflect that California provides retailers subject to a use tax collection requirement with the availability of the state's tax refund procedures, and that those procedures once available are "plain, speedy and efficient."[7]

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[6] National Geographic had paid a determination (assessment) under protest and sued for a refund in state court. This Court took the case after the determination (assessment) had been sustained by the California Supreme Court. (Id. at 555, fn. 3)

[7] See also *Jimmy Swaggart Ministries v. Board of Equalization*, ___U.S. ___, 110 S.Ct. 688, 691-92 (1990).

The only question, decided wrongly by the Ninth Circuit, the Board submits, is whether only retailers who receive determinations (assessments) from the Board may avail themselves of the state's refund procedures or whether retailers who voluntarily comply with California's statutory use tax scheme can file a claim for refund absent a Board assessment which the statute terms a ("determination").

There is no reason why California would penalize retailers who choose to make voluntary payments of the tax amounts without waiting for assessment. In addition to encouraging voluntary tax payments, there is another reason why California would **not** take this approach:

To not provide such retailers with post-payment remedies would permit, **in fact invite**, an otherwise constitutional taxing scheme to be subject to pre-payment federal court interference.

If the Court of Appeals' decision stands, any retailer who has any real or imagined legal challenge to collecting use taxes could bring a pre-payment injunctive action in the federal courts as long as the retailer gets to a federal courthouse before the Board issues a determination.[8]

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[8] What opportunity exists for legislative action to remedy this (claimed) incorrect judicial interpretation of a statute is uncertain. Because, as more fully discussed, infra, California either clearly provides retailers who have not received determinations with the availability of post-payment tax refund actions (or the applicable statutes are susceptible to such interpretation), it is unclear what, if any, legislative action would suffice for the Ninth Circuit.

B. The Court of Appeals' analysis is inconsistent with the basic purposes of the Tax Injunction Act, the underlying principle of comity, and recent decisions of this Court which place the burden on those claiming the unavailability of a state remedy to demonstrate that the remedy is unavailable.

The Court of Appeals, first, correctly observed that "(i)n California the sole legal remedy for resolving tax disputes is a post-payment refund action." App. at A15-A16.

The Court's subsequent, and, the Board submits, patently incorrect, conclusion that such a remedy is not available to DMA's retailers, if these entities have not received determinations (assessments), comes as a result of that Court's failure to acknowledge that only in exceptional circumstances should federal courts interfere in state tax administration and that Court's failure to engage in the analysis thus required by the Tax Injunction Act, the underlying principle of comity and recent decisions of this Court.

This Court has long recognized "the important and sensitive nature of state tax systems and the need for federal court restraint when deciding cases that affect such systems." *Fair Assessment in Real Estate v. McNary*, 454 U.S. 100, 102 (1981). Thus, even prior to the enactment of the Tax Injunction Act (28 U.S.C. § 1341), the Court espoused a principle of equitable restraint in state tax matters. As explained in *Matthews v. Rodgers*, 284 U.S. 521, 525 (1934):

> "The reason for this guiding principle is of peculiar force in cases where the suit . . . is brought to enjoin the collection of a state tax in courts of a different, though paramount sovereignty. The scrupulous regard for the rightful

> independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it."

The Tax Injunction Act reinforces this principle of non-interference with state tax administration, but does not supplant it. On the contrary, this Court has held that the principle of comity underlying the Act is so compelling as to preclude federal intrusion in state tax matters even in situations not specifically covered by the Act. See *Fair Assessment in Real Estate v. McNary*, supra (holding that the principle of comity precludes a suit for monetary damages under 42 U.S.C. § 1983); see also *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943).

The Court of Appeals clearly did not require respondent DMA to demonstrate that its members do not have a plain, speedy and efficient state remedy.[9] In *Franchise Tax Board v. Alcan Aluminium*, this Court noted the insistence of the California income tax board that California courts would entertain and decide the issues which the corporate respondents (in that case) sought to present. This Court, while noting that the income tax Board's opinion is not binding on California courts, nevertheless noted that "respondents [in that case] have not demonstrated that their remedy is uncertain." (*Id.*, at ___ U.S.___, 110 S.Ct. 667).

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[9] See, e.g., *Franchise Tax Board of California v. Alcan Aluminium*, ___ U.S. ___, 110 S.Ct. 661, 677 (1990).

Just as in *Franchise Tax Board v. Alcan Aluminium*, supra, there is not a single reported case in which a California court has refused to address a use tax refund claim by any entity subject to a use tax collection requirement which has brought an action absent issuance of a determination (assessment) by the Board. Inexplicably, California's insistence to the Court of Appeals of the availability of a state (post-payment) remedy was rejected even though respondent was (and is) unable to demonstrate that California's courts will not abide by Cal. Rev. & Tax Code §§ 6901 and 6937 which expressly authorize, if appropriate, refunds and judgments in favor of the "person" (not just the "taxpayer") who pays to the Board the state's use taxes.

As the district court observed, DMA's suit was predicated upon its allegations that California would not provide its members with a claim and suit for refund after payment to the Board of use tax collected absent issuance of a determination. App. at A6-A7. Clearly, DMA's members had not "put to the test" the claim of their trade association that California would not provide a post-payment remedy during which any constitutional challenges would be addressed. Although not a Tax Injunction Act case, apropos here is the following statement in *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15 (1987), where the complaining party asserted that the Texas courts would not entertain its constitutional claims:

> "[D]enegations of the procedural protections afforded by Texas law hardly come from Texaco with good grace, as it apparently made no effort under Texas law to secure the relief sought in this case. (Citation omitted.) Article VI of the United States Constitution declares that

> 'the Judges in every State shall be bound' by the Federal Constitution, law, and treaties. We cannot assume that state judges will interpret ambiguities in state procedural law to bar presentation of federal claims. (Citation omitted.) Accordingly, when a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary."

Given the Ninth Circuit's decision in the current case, it is clear that a similar explicit holding by this Court is necessary in a Tax Injunction Act case in order to afford the protections for state procedures which the Tax Injunction Act was meant to preserve.

C. California's plain, speedy and efficient remedies are available to retailers whether or not determinations are issued by the Board.

The Court of Appeals focused upon the references in Cal. Rev. & Tax Code § 6902 to "taxpayers" and "determinations" in concluding that only taxpayers and those who receive determinations may file a use tax claim for refund. But, even if the Court of Appeals is correct that the statute only specifically mentions "taxpayers" and "determinations," § 6902 is only concerned with statutes of limitations regarding the deadlines for filing refund claims. The statute does not limit who may file such claims and who may receive refunds or judgments.

Cal. Rev. & Tax Code § 6203 requires retailers doing business in California to collect use taxes from the purchasers subject to the use tax and to give receipt for the taxes collected. Cal. Rev. & Tax Code §§ 6451 through

6455 set forth California's use tax return filing and tax remittance requirements for such retailers. Returns are due quarterly (Cal. Rev. & Tax Code § 6451) unless the Board determines, in order to insure payment or collection of taxes, it is necessary for the "seller, retailer or purchaser as the case may be . . . " to file returns during other than quarterly periods or for quarterly periods other than calendar quarters (Cal. Rev. & Tax Code § 6455). A use tax return must show the total sales price of property subject to the tax and the amount of taxes for the period covered (Cal. Rev. & Tax Code § 6453). The return must be accompanied by remittance of the amount of tax due (Cal. Rev. & Tax Code § 6454). Although Cal. Rev. & Tax Code § 6202 specifies that the person storing, using or otherwise consuming personal property is liable for the tax (the "taxpayer"), both Cal. Rev. & Tax Code §§ 6202 and 6452 specifically provide that the "user's" **tax liability and tax return filing obligation are extinguished** upon receiving a receipt from a retailer authorized to collect the tax, which retailer is then required to file a use tax return. (Cal. Rev. & Tax Code § 6452(b).)

Determinations ("assessments") may be issued by the Board **only** if the Board is not satisfied with the return(s) reflecting the amount of tax required to be paid to the state (Cal. Rev. & Tax Code § 6481); if there is a failure to make a return (Cal. Rev. & Tax Code § 6511); and/or if the Board believes that the collection of any amount of tax required to be collected will be jeopardized by delay (a "jeopardy" determination). (Cal. Rev. & Tax Code § 6536)[10]

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[10] The Court of Appeals, therefore, concluded that retailers have remedies if the Board tells such entities (through

(Continued on following page)

California's use tax claim and refund statutes, Cal. Rev. & Tax Code §§ 6901 through 6908 and §§ 6931 through 6937, **do not** require that a person filing a claim, receiving a refund, or receiving a judgment be a "taxpayer" or have received a determination. California Revenue & Taxation Code section 6901 authorizes refunds in favor of the "person" who paid the amount **or** from whom it was collected. Section 6937 of that code authorizes judgment in favor of the "person" who paid the amount. Other relevant statutes similarly contain no requirement that suit be filed by a "taxpayer" or person or entity receiving a determination. For example, section 6932 requires only that a claim for refund or credit be filed before a suit or proceeding may be maintained " . . . for the recovery of any amount alleged to have been erroneously or illegally determined or collected. . . . " Section 19 states that "person" (referenced in Cal. Rev. & Tax Code §§ 6901 and 6937) includes firms, partnerships, corporations, companies or organizations of any kind.

However, even if California Revenue & Taxation Code section 6902 should be read as providing a limitation on the substantive rights to refunds and judgments

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(Continued from previous page)

a determination) that a return should have been filed or more tax should have been remitted, but no remedies if after filing tax returns (with remittances) retailers conclude an overpayment has been made. Such a conclusion is absurd in connection with a taxing scheme which absolves the users of property ("taxpayers") from tax return filing and remittance requirements while at the same time the statutes specifically provide that whoever pays the amount of tax to the Board may receive a tax refund or tax judgment. (Cal. Rev. & Tax Code §§ 6901 and 6937)

provided by sections 6901 and 6937, section 6902 itself would provide refund proceedings to persons who had voluntarily made payments without waiting to receive assessments. Section 6902 references three separate circumstances under which a tax payment can be made and followed subsequently by a claim for refund. The third of the three claim filing limitation periods (six months after actual payment) applies to whoever makes the payment to the Board. Thus, contrary to the strained reading by the Court of Appeals, the plain language of California Revenue and Taxation Code section 6902 fully comports with sections 6901 and 6937 in contemplating refunds to, and judgments in favor of, the person who voluntarily pays the amount to the Board.

In *Holland Furnace v. State Board of Equalization*, 177 Cal.App.2d 672, 2 Cal.Rptr. 606 (1960), plaintiff paid sales and use taxes it reported as due in its returns. Subsequently, plaintiff filed a claim for refund. The California Court of Appeals, focusing upon section 6902, addressed whether that claim had been timely filed.

The court in *Holland* observed that section 6902 provides three separate alternative limitation periods for claims for refund, with limitations determined by which period expires last. The first is measured with reference to the tax period for which its overpayment was received. The second involves the Board's acting to claim a deficiency. The third is measured from the actual claimed overpayment itself, irrespective of whether the overpayment resulted from a determination assessment. The court in *Holland* observed that under the third limitation period of section 6902 a refund claim may be filed at least six months after actual payment "whether the payment

be under the self-assessment provisions of the code or the deficiency provisions." (*Id.*, at 676 (emphasis added).)

By filing returns, retailers self-assess. This is the reason that even if the Court of Appeals is correct that the reference to "taxpayers" in the first claim filing limitation circumstance of section 6902 of the California statute includes only the users of the property, the six months after actual payment, claim filing circumstance is available to whoever makes the payment to the Board.[11]

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[11] The Court of Appeals misquoted the *Holland* court's recitation of then existing Cal. Rev. & Tax Code § 6902, in its footnote 11. (App. at A23) The misquote merged the second and third types of circumstances which can trigger the limitations statute for filing claims for refund, effectively deleting the third (six months from actual payment) circumstance.

The only possible interpretation of the Court of Appeal's opinion is that it found "(f)or taxpayers filing returns," Cal. Rev. & Tax Code § 6902 provides a claim limitation period of "three years from the last day of the month following the quarterly period for which overpayment was made" while for those who receive determinations (and obviously make payments) claims for refund must be filed within six months from the date the determinations become final. However, the Court of Appeals ignored the third circumstance of Cal. Rev. & Tax Code § 6902 which permits a claim for refund to be filed six months from the date of **payment**. This third circumstance (following the court's interpretation that the first circumstance is limited to "taxpayers" and the second to those who receive determinations) is not limited to "taxpayers" or those who receive determinations and is clearly demonstrated by the concluding language of the statute which specifies that a claim for refund may be filed up until the expiration of "whichever period expires the later."

While the Court of Appeals concludes that a retailer receiving a determination (assessment) may avail itself of the statutory remedies, that Court fails to explain "why." In other words, other than citing section 6902, the Court of Appeals does not explain why issuance of a determination to a retailer permits the retailer to avail itself of California's post-payment remedies. Even though Cal. Rev. & Tax Code § 6902 references determinations, California's statutory remedies still require **payment** of the disputed taxes (or amount of taxes subject to collection) before a claim and suit may be filed.

No provision of California's use tax scheme permits or authorizes refunds or court review of tax liabilities, or judgments in favor of, persons (or retailers) who have received determinations. Payment is the requisite to invoking California's plain, speedy and efficient remedies. (See, for example, *National Geographic*, supra, at 555, fn. 3.)

Finally, the Court of Appeals cited *Ashton v. Cory*, 780 F.2d 816 (9th Cir. 1986) as providing "ample support" and involving analogous law and facts, to support its decision that a non-taxpayer paying a tax to the state is ineligible for a claim for refund. App. at A21. Twice in the *Direct Marketing* opinion, the Court of Appeals misquotes the facts in *Ashton*, stating that the employer's vacation trust (the complaining party) was required to file tax returns. App. at A21-A22. **Nowhere in the** *Ashton* decision is there

any reference to a tax return filing requirement on the part of the trust.[12]

CONCLUSION

The public policy considerations embodied by the Congress in the Tax Injunction Act and the underlying principle of comity reflected in this Court's opinions would be seriously undermined if the lower courts, ignoring the example provided in *Franchise Tax Board v. Alcan Aluminium*, supra, were to begin with the presumption that states do not provide sufficient state remedies to trigger application of the Tax Injunction Act. This is especially true in cases where a complaining entity has neither attempted to test the state's asserted sufficient remedies nor is able to cite any reported case where the courts of the state have not provided the requisite remedy after payment of the disputed tax (or tax which was collected).

[12] The reason is because there was (is) no such requirement. Cal. Rev. & Tax Code § 18817 empowers the Franchise Tax Board (hereinafter "FTB"), California's income tax agency, to issue withholding notices requiring the recipient to withhold and **transmit** amounts to FTB. No tax return filing requirement is involved. Section 19051 is the first statute in the first of two comprehensive articles of the Revenue and Taxation Code setting forth the procedures for claims and suits for refunds involving franchise and income taxes. Section 19051, specifically, permits refunds and credits of income tax only in favor of "taxpayers." Section 19082, specifically, permits judgments only in favor of "taxpayers."

Additionally, federal court non-interference with state tax administration, found by this Court to be compelled except in exceptional circumstances, must not be treated in the cavalier fashion applied by the Ninth Circuit Court of Appeals in its legally **and** factually incorrect decision.

The Court of Appeal's decision illustrates an imperative need for an explicit holding by this Court that, as long as state law is susceptible to an interpretation that state tax remedies are plain, speedy and adequate, and as long as the person challenging the tax has provided no examples of the state's denial of such remedies, the Tax Injunction Act must be applied to deny federal court jurisdiction.

It is, therefore, respectfully submitted that a writ of certiorari should issue.

DATED: March 1, 1991

Respectfully submitted,

DANIEL E. LUNGREN, Attorney General of the State of California
TIMOTHY G. LADDISH
Assistant Attorney General
JAMES B. CUNEO, Supervising Deputy Attorney General

STEVEN J. GREEN
Deputy Attorney General
(Counsel of Record)

Attorneys for Petitioner

APPENDIX

NOT FOR PUBLICATION
IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF CALIFORNIA

DIRECT MARKETING ASSOCIATION, INC., etc., Plaintiff, vs. WILLIAM M. BENNETT, etc., et al., Defendants.	CIVIL NO. S-88-1067 MLS FILED APR 25 '89

DECISION AND ORDER

This matter is before the court on defendants' motion to dismiss plaintiff's complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of Federal Rules of Civil Procedure. Plaintiff brought the underlying action for injunctive and declaratory relief on behalf of its members under 28 U.S.C. § 2201 and 42 U.S.C. § 1983. The motion was heard on April 14, 1989 and was taken under submission. The court now renders its decision based on oral argument and the papers submitted by the parties.

I. BACKGROUND

Plaintiff, Direct Marketing Association, Inc., is a trade association whose members are engaged in direct mail advertising and marketing of products. Plaintiff states that a majority of its members are mail order houses located outside of California that accept orders for products by mail or telephone and ship the products to customers by common carrier or other instruments of interstate commerce.

Defendants are individual members and officers of the California Board of Equalization ("the Board"). The Board is responsible for enforcing California's Sales and Use Tax Law.

In 1987, the State of California amended a portion of its Sales and Use Tax Law. In attempting to enforce the new provisions, the Board has demanded that many of plaintiff's members located outside of California who sell products to California residents by use of credit cards issued by California financial institutions register as retailers engaged in business in California under section 6203(f) of the California Revenue and Taxation Code.[1] California requires registered retailers to pay to the state a use tax collected from every person purchasing an item for storage, use, or consumption in the state, unless a

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[1] Section 6203(f) reads, in relevant part:

> [E]very retailer engaged in business in this state and making sales of tangible personal property for storage, use, or other consumption in this state . . . shall, at the time of making the sales . . . collect the tax from the purchaser and give to the purchaser a receipt. . . .
>
> "Retailer engaged in business in this state" . . . means. . . .
>
> (f) Any retailer soliciting orders for tangible personal property by mail if the solicitations are substantial and recurring and if the retailer benefits from any banking, financing, debt collection, telecommunication, or marketing activities occurring in this state or benefits from the location in this state of authorized installation, servicing, or repair facilities.

Cal. Rev. & Tax. Code § 6203(f).

sales tax was previously paid on the item. *See* Cal. Rev. & Tax. Code §§ 6201 through 6207, 6401.

Plaintiff filed this action in district court on August 19, 1988, alleging that enforcement of the state's sales and use tax with respect to plaintiff's out of state members violates the commerce clause of the United States Constitution and the due process clause of the fourteenth amendment. Plaintiff seeks injunctive and declaratory relief, as well as attorneys' fees under 42 U.S.C. § 1988.

Defendants base their motion to dismiss for lack of jurisdiction on several grounds. First, defendants claim immunity from suit under the eleventh amendment. Second, defendants contend that the Tax Injunction Act and principles of comity limit a federal district court's jurisdiction to hear claims for injunctive and declaratory relief respecting state tax matters. Finally, defendants contend that plaintiff lacks standing to bring an action on behalf of its members.

II. ANALYSIS

A. Eleventh Amendment Immunity

Defendants, citing *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 S. Ct. 900 (1984), claim that plaintiff's action against them is barred by the eleventh amendment. As plaintiff correctly points out, the *Ex parte Young* exception to eleventh amendment immunity permits actions against individual state officers when the action is one for prospective injunctive relief against the enforcement of a state statute that allegedly violates federal law. *Pennhurst*, 465 U.S. at 102-03, 104 S. Ct. at 909;

Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347, *reh'g denied*, 416 U.S. 1000 (1974); *Capitol Industries-EMI, Inc. v. Bennett*, 681 F.2d 1107, 1120-21 (9th Cir. 1982), *cert. denied*, 459 U.S. 1087 (1982).

Plaintiff's suit is brought against members and officers of the Board in their individual capacity; it challenges the constitutionality of actions the officials have taken based on state law. The suit falls squarely within the *Ex parte Young* exception to eleventh amendment immunity doctrine. Therefore, this action is not barred by the eleventh amendment.

B. Tax Injunction Act

Defendants claim plaintiff's action is barred by the Tax Injunction Act, 28 U.S.C. § 1341. That statute reads:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1341. The Act divests the district court of jurisdiction to issue injunctive and/or declaratory relief against a state's administration of its tax laws as long as the state's courts provide a "plain, speedy and efficient remedy" for those alleging a wrong has occurred, even when the wrong alleged is a constitutional violation. *California v. Grace Brethren Church*, 457 U.S. 393, 102 S. Ct. 2498 (1982).

The Tax Injunction Act has its roots in equity practice, principles of federalism and comity, and the recognition of the need for a state to administer its own fiscal

operations. *Capitol Industries-EMI*, 681 F.2d at 1112 (9th Cir. 1982) (citations omitted); *See also Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 102 S. Ct. 177 (1981).

1. Plain, Speedy and Efficient Remedy

The minimal procedural criteria a state court remedy must meet in order to be plain, speedy and efficient includes providing " 'the taxpayer with a full hearing and judicial determination at which she may raise any and all constitutional objections to the tax.' " *Grace Brethren*, 457 U.S. at 411, 102 S. Ct. at 2509 (quoting *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 514, 101 S. Ct. 1221, 1229 (1981)).

Defendants state that a plain, speedy and efficient procedure is available to plaintiff's members because they may file a claim for refund with the Board after paying the use tax collected or after paying an assessed amount under protest, and, if necessary, plaintiff's members may file suit for refund after their administrative remedies are exhausted. *See* California Constitution, article XIII, § 32; Cal. Rev. & Tax. Code §§ 6901 through 6908, and §§ 6931 through 6937.

The Supreme Court and the Ninth Circuit have found that the scheme the State provides for challenging state taxes and/or the State's administration of its tax laws is "plain, speedy and efficient" if the remedy is available to the party attempting the challenge. *See, e.g. Grace Brethren*, 457 U.S. at 417, 102 S. Ct. at 2512-13 (unemployment insurance tax); *Shell Petroleum, N.V. v. Graves*, 709 F.2d

593, 597 (9th Cir. 1983), *cert. denied*, 464 U.S. 1012 (1983) (unitary business tax); *Capitol Industries-EMI*, 681 F.2d at 1118 (unitary business tax); *Wood v. Sargent*, 694 F.2d 1159, 1160-61 (9th Cir. 1982) (unemployment insurance tax); *Corbett v. Printer's and Publisher's Corporation*, 127 F. 2d 195, 197 (9th Cir. 1942) (sales tax).

2. Availability of Remedy

Plaintiff contends that the state's remedy is not available for two reasons. First, citing California Revenue and Taxation Code § 6902, plaintiff claims that only a taxpayer may make a claim for a refund. Plaintiff argues that since the use tax is levied on the consumer and the retailer is a mere collector of the tax, retailers may not seek a refund of the tax they collect and pay to the Board.

In determining whether a state provides a party with a plain, speedy and efficient remedy, a court may look to both state statutes and appropriate state case law. *Sacks Bros. Loan Co., Inc. v. Cunningham*, 578 F.2d 172, 175 (7th Cir. 1978). As defendants point out, the State of California has allowed retailers who paid an assessment for the state's use tax under protest to then file for a refund of the tax paid. *See National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 554 n.3, 97 S. Ct. 1386, 1389 n.3 (1977); *National Geographic Society v. State Board of Equalization*, 16 Cal. 3d 637, 641 (1976); *Bank of America v. State Board of Equalization*, 209 Cal. App. 2d 780 (1962). If the claim for refund is denied by the Board, the retailer may then sue in state court, where his claims of violations of the federal constitution may be heard. *See Capitol Industries-EMI*, 681 F.2d at 1116-17; *National Geographic*

Society, 16 Cal. 3d 637. Based on state case law, it is clear that the state scheme provides plaintiff's members with a plain, speedy and efficient remedy in the State's courts.

Plaintiff also argues that the state remedy is not available to its members because the Board has not yet issued a determination or assessment of the taxes its members must pay to the Board. This argument presents a ripeness issue that has no relevance to the issue of the ultimate availability to plaintiff's members of the remedy provided by the State in its courts.

Based on this analysis, the court finds that the Tax Injunction Act, 28 U.S.C. § 1341, divests it of jurisdiction to hear plaintiff's complaint.

C. Standing

The court does not reach the issue of standing because, under the Tax Injunction Act, it lacks jurisdiction over this action.

Accordingly, the court orders that plaintiff's complaint is DISMISSED for lack of subject matter jurisdiction, and previously scheduled hearing and conference dates are hereby vacated.

IT IS SO ORDERED.

DATED: April 25, 1989.

/s/ Milton L. Schwartz
UNITED STATES
DISTRICT JUDGE

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DIRECT MARKETING ASSOCIATION, INC.,
Plaintiff-Appellant,
vs.
WILLIAM M. BENNETT; CONWAY H. COLLIS; ERNEST J. DRONENBURG, JR.; PAUL CARPENTER; GRAY DAVIS, CINDY RAMBO; JOHN GIBBS; LUCIAN KHAN; SHIELA J. GUSTIN,
Defendants-Appellees.

89-15716
CV-S-88-1067-MLS
FILED
JAN 2 1991

APPEAL from the United States District Court for the EASTERN District of CALIFORNIA (SACRAMENTO).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the EASTERN District of CALIFORNIA and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of

the said District Court in this Cause be, and hereby is REVERSED AND REMANDED.

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST

DEC 26 1990

by: Sylvia McAlister
Deputy Clerk

Filed and entered 10-23-90

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DIRECT MARKETING ASSOCIATION, INC., Plaintiff-Appellee, v. WILLIAM M. BENNETT; CONWAY H. COLLIS; ERNEST J. DRONENBURG, JR.; PAUL CARPENTER; GRAY DAVIS; CINDY RAMBO; JOHN GIBBS; LUCIAN KHAN; SHIELA J. GUSTIN Defendants-Appellees.	No. 89-15716 D.C. No. 88-1067-MLS ORDER FILED DEC 14 1990

Before: CHOY, WIGGINS and LEAVY, Circuit Judges.

The panel as constituted in the above case has voted to the deny the petition for rehearing.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DIRECT MARKETING ASSOCIATION, INC., *Plaintiff-Appellant,* v. WILLIAM M. BENNETT; CONWAY H. COLLIS; ERNEST J. DRONENBURG, JR.; PAUL CARPENTER; GRAY DAVIS; CINDY RAMBO; JOHN GIBBS; LUCIAN KHAN; SHIELA J. GUSTIN, *Defendants-Appellees.*	No. 89-15716 D.C. No. CV-S-88-1067-MLS OPINION

Appeal from the United States District Court
for the Eastern District of California
Milton L. Schwartz, District Judge, Presiding

Argued and Submitted
July 17, 1990 – San Francisco, California

Filed October 23, 1990

Before: Herbert Y.C. Choy, Charles Wiggins and Edward Leavy, Circuit Judges.

Opinion by Judge Choy

George S. Isaacson and Martin I. Eisenstein, Brann & Isaacson, Lewiston, Maine; John A. Mendez, Downey, Brand, Seymour & Rohwer, Sacramento, Cal., for the plaintiff-appellant.

Steven J. Green, Deputy Atty. Gen. of the State of Cal., Sacramento, Cal., for defendants-appellees.

Appeal from the United States District Court for the Eastern District of California.

Before CHOY, WIGGINS and LEAVY, Circuit Judges.

CHOY, Circuit Judge:

Direct Marketing Association (DMA) appeals the district court's dismissal of its action against various members of the California State Board of Equalization. The district court held that the Tax Injunction Act barred federal jurisdiction over DMA's action. We reverse.

FACTS

Plaintiff-appellant DMA is a trade association whose members are engaged in direct mail advertising and marketing of products. DMA states that a majority of its members are mail order houses located outside of California that accept orders for products by mail or telephone and ship the products to customers.

Defendants are individual members of the California Board of Equalization, which is responsible for enforcing California's sales and use tax law.

In 1987, the State of California amended a portion of its sales and use tax law to require interstate mail order retailers to collect use tax from their California customers. The Board has demanded that many of DMA's members located outside of California who sell products to California residents by use of credit cards issued by California financial institutions register as retailers engaged in business in California under section 6203(f) of

the California Revenue and Taxation Code.[1] California requires registered retailers to pay a use tax collected from every person purchasing an item for storage, use, or consumption in the state unless a sales tax was previously paid on the item. Cal.Rev. & Tax. Code §§ 6201 through 6207, 6401.

DMA filed this action in district court on August 19, 1988, alleging that enforcement of the state's sales and use tax with respect to DMA's out-of-state members violates the commerce clause of the United States Constitution and the due process clause of the fourteenth amendment.[2] DMA sought injunctive and declaratory relief, as well as attorney's fees under 42 U.S.C. § 1988.

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[1] Section 6203(f) reads, in relevant part:

> (E)very retailer engaged in business in this state and making sales of tangible personal property for storage, use, or other consumption in this state . . . shall, at the time of making the sales . . . collect the tax from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the board.
>
> "Retailer engaged in business in this state" . . . means (f) Any retailer soliciting orders for tangible personal property by mail if the solicitations are substantial and recurring and if the retailer benefits from any banking, financing, debt collection, telecommunication, or marketing activities occurring in this state or benefits from the location in this state of authorized installation, servicing, or repair facilities.

[2] DMA's complaint relies on the constitutional doctrine of nexus established by the U.S. Supreme Court in *National Bellas*

(Continued on following page)

The district court granted defendant Board's motion to dismiss on the ground that DMA's members had a plain, speedy, and efficient remedy under state law. Specifically, the district court found that DMA's members were not precluded from paying the contested taxes and then filing for a refund. It thus held that the Tax Injunction Act barred proceedings in federal court.[3] A dismissal based on lack of subject matter jurisdiction is freely reviewable on appeal. *Redding Ford v. California State Board of Equalization*, 722 F.2d 496, 497 (9th Cir.1983), *cert. denied*, 469 U.S. 817, 105 S.Ct. 84, 83 L.Ed.2d 31 (1984).

(Continued from previous page)

Hess, Inc. v. Department of Revenue of the State of Illinois, 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505 (1967), that a state may not impose use tax collection responsibilities on a retailer that maintains no physical facilities or employees within the state, but, instead, limits its business activities to the distribution of catalogs through the United States Mail and then delivers its goods by parcel post and interstate common carriers. DMA alleges that the Board's application of section 6203(f) to DMA members who have no nexus with California is inconsistent with the constitutional principle established in *National Bellas Hess*.

[3] Having decided that the Tax Injunction Act barred federal jurisdiction, the court declined to rule on defendant Board's contention that DMA lacked standing to bring suit on behalf of its members. The standing issue is not raised on this appeal. This court has held in a similar context that, where standing is not the basis for the district court's order of dismissal, the issue should be remanded to be dealt with in the first instance by the district court. *Capitol Industries-EMI, Inc. v. Bennett*, 681 F.2d 1107, 1119, n. 31 (9th Cir.), *cert. denied*, 455 U.S. 943, 102 S.Ct. 1438, 71 L.Ed.2d 655 (1982).

DISCUSSION

I.

The Tax Injunction Act bars federal courts from enjoining the collection of state taxes "where a plain, speedy and efficient remedy may be had in the courts of such State."[4] A state remedy is not plain within the meaning of the Tax Injunction Act, however, "if there is uncertainty regarding its availability or effect." *Ashton v. Cory*, 780 F.2d 816, 819 (9th Cir.1986). *See also Township of Hillsborough v. Cromwell*, 326 U.S. 620, 625-26, 66 S.Ct. 445, 449, 90 L.Ed. 358 (1946) (where uncertainty regarding the availability of a remedy under New Jersey law rendered the state's remedy speculative, district court properly retained jurisdiction); *Alcan Aluminum Ltd. v. Department of Revenue of State of Oregon*, 724 F.2d 1294, 1297 (7th Cir.1984) (ambiguity of Oregon tax statutes rendered availability of remedy uncertain, and thus the Tax Injunction Act did not apply to bar federal jurisdiction); *Garrett v. Bamford*, 538 F.2d 63, 67 (3d Cir.), *cert. denied*, 429 U.S. 977, 97 S.Ct. 485, 50 L.Ed.2d 585 (1976) (" . . . it is sufficient for a finding of inadequacy that the availability of the state remedy be merely uncertain.").

In California the sole legal remedy for resolving tax disputes is a postpayment refund action.[5] Only after

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[4] 28 U.S.C. § 1341.

[5] Article XIII, section 32 of the California Constitution prohibits lawsuits to enjoin the collection of state taxes. It provides:

(Continued on following page)

filing a claim for refund can a party institute a court action challenging the collection of a tax.[6] The issue in this case is whether DMA's members may avail themselves of the refund procedure for sales and use taxes set forth in sections 6901 through 6908 of the California Revenue and Taxation Code.

DMA contends that the state's remedy is unavailable for two reasons. First, citing California Revenue & Taxation Code § 6902, DMA claims that only a taxpayer may make a claim for refund. DMA argues that since the use tax is levied on the consumer and the retailer is a mere collector of the tax, retailers may not seek a refund of the

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> "No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature."

Section 6931 of the California Revenue and Taxation Code applies Article XIII, section 32 to sales and use tax disputes, prohibiting actions to enjoin or prevent their collection. The statute and Constitution have been read to bar declaratory judgment actions as well as injunctive relief. *See State Board of Equalization v. Superior Court*, 39 Cal.3d 633, 639, 217 Cal.Rptr. 238, 241, 703 P.2d 1131 (1985).

> [6] "No suit or proceeding shall be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally determined or collected unless a claim for refund or credit has been duly filed pursuant to Article 1 (commencing with Section 6901)." Cal.Rev. & Tax. Code § 6932.

tax they collect and pay to the Board. Second, DMA argues that the remedy is not available because its members have not received determinations.

We agree. The relevant provision, section 6902, establishes the limitation periods for filing refund claims. It reads:

> (a) *For taxpayers filing returns* on other than an annual basis, except as provided in subdivision (b) no refund shall be approved by the board after three years from the last day of the month following the quarterly period for which the overpayment was made, or, *with respect to determinations made under Article 2 (commencing with Section 6481), 3 (commencing with Section 6511), or 4 (commencing with Section 6536)* of Chapter 5 of this part, after six months from the date the determinations become final, or after six months from the date of overpayment, whichever period expires the later, unless a claim therefor is filed with the board within such period. (emphasis added).

Section 6902 thus provides limitation periods only for "taxpayers" and those who have received "determinations." DMA's members fall into neither category, thus making it sufficiently uncertain whether they have a remedy available to them.

II.

First, California law makes clear that the retailer is not the taxpayer with respect to the use tax. The use tax, unlike the sales tax, is imposed upon the *purchaser* rather than the retailer. Under the California use tax statute, the

use tax[7] is an excise tax imposed on "the storage, use, or other consumption in this state of tangible personal property purchased from any retailer . . . " Cal.Rev. & Tax. Code § 6201. Section 6202 of California's use tax statute provides that "(e)very person storing, using, or otherwise consuming in this State tangible personal property purchased from a retailer is liable for the tax." In contrast, the sales tax is a tax imposed upon the retailer for the privilege of selling tangible personal-property.[8] Although California's use tax is imposed upon the purchaser, the retailer is responsible for collecting the tax from the purchaser and remitting it to the Board.[9]

California case law also makes clear that the use tax is not a tax imposed upon the retailer. In *Bank of America v. State Board of Equalization*, the California Court of Appeals explained the relationship of the retailer to the use tax:

> . . . the use tax is a tax levied upon the purchaser. It is not a tax on the retailer; nor does it shift to him because he has the duty to collect it

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[7] The use tax is a means of taxing those transactions occurring outside of the territory of a state, where a sales tax cannot be constitutionally imposed. *See generally*, "Use Tax Collection Jurisdiction: A State Border Held Hostage," 63 *Chicago-Kent L. Rev.* 747, 749 (1987). Under a use tax, a person buying something from an out-of-state source is liable for a use tax at a rate identical to the sales tax in the purchaser's home state.

[8] The provision dealing with imposition of the sales tax states: "For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers . . . " Cal.Rev. & Tax. Code § 6051.

[9] Cal.Rev. & Tax. Code § 6203(f).

> from the consumer . . . the liability of the retailer is not, therefore, for the use tax itself but for an *amount equivalent* to it because of his default in his duty as collection agent. *The taxpayer is the person ultimately liable for the tax itself, and not the person who pays the tax liability. Bank of America v. State Board of Equalization*, 209 Cal.App.2d 780, 799, 26 Cal.Rptr. 348, 359-60 (1963) (citations omitted) (emphasis added).

See also Brandtjen & Kluge v. Fincher, 44 Cal.App.2d Supp. 939, 111 P.2d 979, 981 (1941) (use tax makes the purchaser, not the seller, liable for the tax).

The Board insists that the taxpayer/nontaxpayer distinction is immaterial with respect to invoking the refund procedure. Rather, the Board argues, whoever files the tax return is entitled to initiate a claim for refund under section 6902. However, the Board fails to point to any statutory language that so provides. The only parties referenced in the "claim for refund" provision of section 6902, apart from those who receive "determinations," are "*taxpayers* filing returns . . . " In California, it is clear that a "taxpayer" is simply not the person who remits to the Board the amount of tax collected. We decline to overlook the specific statutory language of section 6902 and thus reject the Board's argument.

The district court accepted the Board's contention that a retailer who voluntarily remits use taxes may file a refund claim. However, each case cited by the district court involved a retailer who had been issued a formal determination by the Board. *National Geographic Society v. State Board of Equalization*, 16 Cal.3d 637, 640-41, 128 Cal.Rptr. 682, 684, 547 P.2d 458, 683-84 (1976), *aff'd*, 430 U.S. 551, 97 S.Ct. 1386, 51 L.Ed.2d 631 (1977); *Bank of*

America v. State Board of Equalization, 209 Cal.App.2d at 789-90, 26 Cal.Rptr. at 353. Thus, the District Court disregarded DMA's argument that the existence of an outstanding assessment is critical to the right of a non-taxpayer to use the statutory claim for refund procedure.

DMA's concern that its status as a non-taxpayer renders precarious its right to seek a tax refund finds ample support in other cases. For example, with respect to the sales tax, California courts have held that the purchaser is precluded from seeking a refund because he is not considered the "taxpayer." *See State Board of Equalization v. Superior Court*, 111 Cal.App.3d 568, 570, 169 Cal.Rptr. 3, 4 (1980). In *Javor v. State Board of Equalization*, 12 Cal.3d 790, 117 Cal.Rptr. 305, 527 P.2d 1153 (1974) the California Supreme Court agreed with the Board that customers may not seek a refund of sales tax since the sales tax is imposed upon the retailer. In fact, in *Javor* the Board argued the exact opposite of what it argues here. It contended that "since the sales tax is imposed not on the consumer but on the retailer who is authorized but not required to reimburse himself by 'passing on' the tax, *there is no statutory authority for an action against the Board by an individual paying sales tax reimbursement* (i.e., by the consumer) *and such authority is a prerequisite to suit against the Board.*" 117 Cal.Rptr. at 309, 527 P.2d at 1157 (citation omitted) (emphasis added).

The Board attempts to explain *State Board of Equalization v. Superior Court*, 111 Cal.App.3d 568, 169 Cal.Rptr. 3, on the ground that the purchaser cannot bring a sales tax refund action because he is not the party who remits the tax to the Board. However, the court itself predicated its opinion on the fact that the purchaser is not the taxpayer

with respect to the sales tax. Likewise, in the instant case, the retailer is not the "taxpayer," since, under California law, "[t]he taxpayer is the person ultimately liable for the tax itself, and not the person who pays the tax liability." *Bank of America v. State Board of Equalization*, 209 Cal.App.2d at 799, 26 Cal.Rptr. at 360; *See generally* Hartman, "Collection of the Use Tax on Out-of-State Mail-Order Sales," 39 *Vand. L. Rev.* 961, 991 (1986) ("[I]t is to be noted that the mail-order house is not the taxpayer, at least not in the normal sense of that term.")

Similarly, in a case closely analogous to the present matter, this court found that a non-taxpayer had no clear right to sue for a refund with respect to the California state income tax. *Ashton v. Cory*, 780 F.2d at 823. In *Ashton v. Cory*, the non-taxpayer was an employer's vacation trust that was required to determine the amount of withholding from employees' wages, file returns, and remit the tax to the California Franchise Tax Board. Cal.Rev. & Tax. Code § 18817. Despite the fact that the vacation trust was the party required to remit the tax to the Board, this court agreed with the trust's argument that the trust had "no plain remedy under California law, since it is not the party from whom the tax is due, and may therefore pay the levy and be ineligible for a refund under Cal.Rev. & Tax. Code § 19051."[10] The Board's purported distinction of *Ashton* on the ground that the retailer is responsible for

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[10] Section 19051 provides: "If the Franchise Tax Board or the board, as the case may be, finds that there has been an overpayment of any liability imposed under this part by a taxpayer for any year for any reason, the amount of the overpayment shall be credited against the amount then due from the taxpayer and the balance refunded to the taxpayer."

paying the use tax and filing tax returns is unavailing. The employer vacation trust plan, just like the retailer for the use tax, is required to collect the state income tax by withholding from employees' wages, to pay the tax to the state and to file returns. *Id.* at 819. And just like the retailer, the vacation trust fund is not the taxpayer, but nevertheless is required to collect and remit the tax.

The legislative history of section 6902 casts further doubt on whether or not a remedy is currently available to retailers who voluntarily remit use taxes. The predecessor statute to the current use tax statute was explicit in providing that retailers who voluntarily paid use taxes could file a refund action. Section 29 of the Use Tax Act of 1935 provided:

> No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against this State or against any officer thereof to prevent or enjoin under this act the collection of any tax or any amount of tax herein required to be collected; but after payment of any such tax or any such amount of tax herein required to be collected under protest, duly verified and setting forth the grounds of objection to the legality thereof, *the retailer or person making the payment may bring an action against the State Treasurer in a court of competent jurisdiction in the county of Sacramento for the recovery of the amount paid under protest* (emphasis added).

In 1941, however, the use tax statute was amended and the second part of section 29, providing the explicit right of action to the retailer, was deleted. No similar provision permitting a retailer the right to sue for a

refund for use taxes was incorporated into the new tax code.

Finally, the Board fails to cite any case that unequivocally shows that a non-taxpayer retailer who voluntarily remits use taxes to the Board can sue for a refund. The Board's reliance on *Holland Furnace v. State Board of Equalization*, 177 Cal.App.2d 672, 2 Cal.Rptr. 606 (1960) is misplaced, because the language of the current refund provision differs from that in *Holland*. Importantly, at the time of the *Holland* decision, section 6902 did not specifically refer to "taxpayers."[11] In 1977, section 6902 was amended and the word "taxpayers" inserted, bringing section 6902 into its current form.[12]

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[11] At the time of the *Holland* decision, the relevant provision read:

> "No refund shall be approved by the board after three years from the last day of the month following the close of the quarterly period for which the overpayment was made, or, with respect to determinations made under Article 2 or 3 of Chapter 5 of this part, after six months from the date of overpayment, whichever period expires the later, unless a claim therefor is filed with the board within such period." *See Holland*, 2 Cal.Rptr. at 607.

[12] The Board's reliance on *Union Oil Co. v. State Board of Equalization*, 60 Cal.2d 441, 34 Cal.Rptr. 872, 386 P.2d 496 (1963) is equally inapposite, since the refund provision at the time of that case contained no reference to "taxpayers." Moreover, the use tax collector who sought a refund had received an assessment.

III.

DMA also argues that the state remedy is not available to its members because the Board has not yet issued a determination. The district court dismissed this argument on the ground that it "presents a ripeness issue that has no relevance to the issue of the ultimate availability to plaintiff's members of the remedy."

We disagree. This court has recently held inadequate a refund scheme in which a trust had to wait for the issuance of an assessment of amounts not paid before invoking the refund procedure. *Retirement Fund Trust of the Plumbing v. Franchise Tax Board*, 909 F.2d 1266, 1273-74 (9th Cir.1990). We stated two reasons for our holding. First, to invoke the refund procedure, the trust had to first fail to pay the amounts due, which failure exposed it to substantial penalties and interest. Second, such a scheme is inadequate because whether the state will issue an assessment becomes a matter of speculation. *Id.* (citing *Ashton v. Cory*, 780 F.2d at 820); *see also Georgia RR & Banking Co. v. Redwine*, 342 U.S. 299, 303 n. 11, 72 S.Ct. 321, 324 n. 11, 96 L.Ed. 335 (1952) (finding scheme under which the taxpayer must await state collection procedure to present federal claims inadequate because "this is hardly a remedy that could have been invoked by appellant."). These rationales apply in the instant case. Failure to file use tax returns by DMA's members exposes them to the risk of substantial penalties,[13] and whether or not

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[13] Cal.Rev. & Tax. Code § 6511 (imposing a 10 percent penalty for failure to file a return).

the state will issue a determination is a matter of speculation. The mere possibility that DMA's members may receive determinations does not render certain the availability of a remedy. Certainty that a remedy exists is an important factor in establishing that a state court remedy is "plain." *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 516-17, 101 S.Ct. 1221, 130-31, 67 L.Ed.2d 464 (1981).

CONCLUSION

The current statutory language, the legislative history of the use tax statute, and the interpretation of analogous refund provisions all make it sufficiently uncertain whether a retailer who voluntarily remits use taxes may file a refund claim under section 6902. Because the availability of a remedy to DMA's members is uncertain, the Tax Injunction Act does not apply to bar federal jurisdiction. We therefore REVERSE and REMAND.

§ 19. "Person"

"Person" includes any person, firm, partnership, association, corporation, company, syndicate, estate, trust, business trust, or organization of any kind.

§ 6202. Persons liable for tax; Extinguishment of liability

Cal Jur 3d Sales and Use Taxes §§ 43, 44.

2. Particular Applications

In an action to recover money paid under protest by plaintiff's assignor for use taxes applicable to the storage, use or consumption of wooden shingles purchased by defendant from the assignor, the trial court properly rendered judgment in favor of plaintiff after finding that the assignor had not collected the use tax from defendant pursuant to Rev. & Tax. Code, § 6201 et seq. The record indicated defendant purchased the shingles for his own use, and the shingles were not for resale. The price quoted to defendant by the assignor and paid by defendant to the assignor was a net price. The purchase order confirmations and invoices contained language stating that any sales, use or transport tax was for the buyer's account. Collins v Adair Roofing, Inc. (1980) 104 CA3d 806, 163 Cal Rptr 96.

In imposing a use tax on a record company's purchase of master tapes from out of state independent producers (Rev. & Tax. Code, § 6202), while exempting movie companies' leases of motion pictures and their sound tracks, the Legislature did not act arbitrarily in its classification. The record company, as purchaser of master tapes, was not within the same class as movie studios that

lease movies, and the movies and the master tapes were not functionally the same. Additional work must be done on the sound components of movies in order to make them useful for the purpose of producing products for sale to the general public, while the same is not true of a record company's master sound tapes. Thus there were sufficient differences between the acquisition and use of master sound tapes and movies to justify different treatment of the record industry and the movie industry by the Legislature. Capitol Records, Inc. v. State Bd. of Equalization (1984, 3d Dist) 158 Cal App 3d 582, 204 Cal Rptr 802.

§ 6203. Collection of tax by retailer; Receipt to purchaser; "Retailer engaged in business in this State"

Except as provided by Sections 6292 and 6293, every retailer engaged in business in this state and making sales of tangible personal property for storage, use, or other consumption in this state, not exempted under Chapter 3.5 (commencing with Section 6271) or Chapter 4 (commencing with Section 6351), shall at the time of making the sales or, if the storage, use, or other consumption of the tangible personal property is not then taxable hereunder, at the time the storage, use, or other consumption becomes taxable, collect the tax from the purchaser and give to the purchaser a receipt for the tax in the manner and form prescribed by the board.

As respects leases constituting sales of tangible personal property, the tax shall be collected from the lessee at the time accounts are paid by the lessee under the lease.

"Retailer engaged in business in this state," as used in this section and in Section 6202, means and includes any of the following:

(a) Any retailer maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place, or other place of business.

(b) Any retailer having any representative, agent, salesperson, canvasser, or solicitor operating in this state under the authority of the retailer or its subsidiary for the purpose of selling, delivering, or the taking of orders for any tangible personal property.

(c) As respects a lease, any retailer deriving rentals from a lease of tangible personal property situated in this state.

(d) Any retailer soliciting orders for tangible personal property by means of a telecommunication or television shopping system (which utilizes toll free numbers) which is intended by the retailer to be broadcast by cable television or other means of broadcasting, to consumers located in this state.

(e) Any retailer who, pursuant to a contract with a broadcaster or publisher located in this state, solicits orders for tangible personal property by means of advertising which is disseminated primarily to consumers located in this state and only secondarily to bordering jurisdictions.

(f) Any retailer soliciting orders for tangible personal property by mail if the solicitations are substantial and recurring and if the retailer benefits from any banking,

financing, debt collection, telecommunication, or marketing activities occurring in this state or benefits from the location in this state of authorized installation, servicing, or repair facilities.

(g) Any retailer owned or controlled by the same interests which own or control any retailer engaged in business in the same or similar line of business in this state.

(h) Any retailer having a franchisee or licensee operating under its trade name if the franchisee or licensee is required to collect the tax under this section.

(i) Any retailer who, pursuant to a contract with a cable television operator located in this state, solicits orders for tangible personal property by means of advertising which is transmitted or distributed over a cable television system in this state.

§ 6451. Quarterly due dates

The taxes imposed by this part are due and payable to the board quarterly on or before the last day of the month next succeeding each quarterly period.

§ 6452. Time for filing return; Persons required to file; Signing; Punishment for failure to file

(a) On or before the last day of the month following each quarterly period of three months, a return for the preceding quarterly period shall be filed with the board in such form as the board may prescribe.

(b) For purposes of the sales tax, a return shall be filed by every seller and also by every person who is liable for the sales tax under this part. For purposes of the use tax,

a return shall be filed by every retailer engaged in business in this state and by every person purchasing tangible personal property, the storage, use, or other consumption of which is subject to the use tax, who has not paid the use tax due to a retailer required to collect the tax. Returns shall be signed by the person required to file the return or by his duly authorized agent but need not be verified by oath.

(c) Any retailer or other person who fails or refuses to furnish any return required to be made, or who fails or refuses to furnish a supplemental return or other data required by the board, is guilty of a misdemeanor punishable as provided in Section 7153.

§ 6453. Contents of return

For purposes of the sales tax, the return shall show the gross receipts of the seller during the preceding reporting period and, in the case of a person who is liable for the sales tax and is not a seller, the gross receipts of such person for the period in which the liability was incurred. For purposes of the use tax, in case of a return filed by a retailer, the return shall show the total sales price of the property sold by him or her, the storage, use, or consumption of which property became subject to the use tax during the preceding reporting period; in case of a return filed by a purchaser, the return shall show the total sales price of the property purchased by him or her, the storage, use, or consumption of which became subject to the use tax during the preceding reporting period.

The return shall also show the amount of the taxes for the period covered by the return and any other information

which the board deems necessary for the proper administration of this part.

§ 6454. Filing return and remittance

The person required to file the return shall deliver the return together with a remittance of the amount of the tax due to the office of the board.

§ 6455. Returns for quarterly periods other than calendar quarters; Punishment for failure to file

(a) The board, if it deems it necessary in order to insure payment to or facilitate the collection by the state of the amount of taxes, may require returns and payment of the amount of taxes for quarterly periods other than calendar quarters depending upon the principal place of business of the seller, retailer or purchaser as the case may be, or for designated periods other than quarterly periods.

(b) On or before the last day of the month following each designated period, a return for the preceding designated period shall be filed with the board in such form as the board may prescribe.

(c) Any retailer or other person who fails or refuses to furnish any return required by law to be made, or who fails or refuses to furnish a supplemental return or other data required by the board, is guilty of a misdemeanor punishable as provided in Section 7153.

§ 6481. Deficiency determinations

If the board is not satisfied with the return or returns of the tax or the amount of tax, or other amount, required to

be paid to the state by any person, it may compute and determine the amount required to be paid upon the basis of the facts contained in the return or returns or upon the basis of any information within its possession or that may come into its possession. One or more deficiency determinations may be made of the amount due for one or for more than one period. When a business is discontinued a determination may be made at any time thereafter, within the periods specified in Section 6487, as to liability arising out of that business, irrespective of whether the determination is issued prior to the due date of the liability as otherwise specified in this part.

§ 6511. Estimate by board; Computation and determination of amount and penalty; Determination upon discontinuance of business

If any person fails to make a return, the board shall make an estimate of the amount of the gross receipts of the person, or, as the case may be, of the amount of the total sales price of tangible personal property sold or purchased by the person, the storage, use, or other consumption of which in this state is subject to use tax. The estimate shall be made for the period or periods in respect to which the person failed to make a return and shall be based upon any information which is in the board's possession or may come in its possession. Upon the basis of this estimate the board shall compute and determine the amount of tax or other amount required to be paid to the state, adding to the sum thus arrived at a penalty equal to 10 percent thereof. One or more determinations may be made for one or for more than one period. When a business is discontinued a determination

may be made at any time thereafter, within the periods specified in Section 6487, as to liability arising out of that business, irrespective of whether the determination is issued prior to the due date of the liability as otherwise specified in this part.

Amended Stats 1984 ch 930 § 4.

§ 6536. Jeopardy determination; Duty of board to make; Due date

If the board believes that the collection of any tax or any amount of tax required to be collected and paid to the state or of any determination or other amount required to be paid to the state will be jeopardized by delay, it shall thereupon make a determination of the tax or amount required to be collected or other amount, noting that fact upon the determination. The amount determined is immediately due and payable.

Amended Stats 1984 ch 930 § 6.

§ 6901. Certification of excess amount collected; Credit and refund

If the board determines that any amount, penalty, or interest has been paid more than once or has been erroneously or illegally collected or computed, the board shall set forth that fact in the records of the board and shall certify to the State Board of Control the amount collected in excess of the amount legally due and the person from whom it was collected or by whom paid. If approved by the State Board of Control the excess amount collected or paid shall be credited by the board on any amounts then due and payable from the person

from whom the excess amount was collected or by whom it was paid under this part, and the balance shall be refunded to the person, or his or her successors, administrators, or executors.

The board, however, without obtaining approval of the State Board of Control may credit the amount on any amounts then due and payable under this part from the person by whom the amount was paid and may refund the balance to the person or his or her successors, administrators, or executors, if a determination by the board is made in either of the following cases:

(a) An amount of tax, interest, or penalty not exceeding fifty thousand dollars ($50,000) was not required to be paid.

(b) Any amount of prepayment of sales tax, interest, or penalty paid pursuant to Article 1.5 (commencing with Section 6480) of Chapter 5 was not required to be paid.

Any overpayment of the use tax by a purchaser to a retailer who is required to collect the tax and who gives the purchaser a receipt therefor pursuant to Article 1 (commencing with Section 6201) of Chapter 3 shall be credited or refunded by the state to the purchaser.

§ 6902. Filing claim for refund or credit: Necessity for

(a) For taxpayers filing returns on other than an annual basis, except as provided in subdivision (b) no refund shall be approved by the board after three years from the last day of the month following the close of the quarterly period for which the overpayment was made, or, with

respect to determinations made under Article 2 (commencing with Section 6481), 3 (commencing with Section 6511), or 4 (commencing with Section 6536) of Chapter 5 of this part, after six months from the date the determinations become final, or after six months from the date of overpayment, whichever period expires the later, unless a claim therefor is filed with the board within such period.

For taxpayers filing returns on an annual basis, except as provided in subdivision (b) no refund shall be approved by the board after three years from the last day of the calendar month following the one year period for which the overpayment was made, or with respect to determinations made under Article 2 (commencing with Section 6481), 3 (commencing with Section 6511), or 4 (commencing with Section 6536) of Chapter 5 of this part, after six months from the date the determinations become final, or after six months from the date of overpayment, whichever period expires the later, unless a claim therefor is filed with the board within such period. No credit shall be approved by the board after the expiration of such period unless a claim for credit is filed with the board within such period, or unless the credit relates to a period for which a waiver is given pursuant to Section 6488.

(b) A refund may be approved by the board for any period for which a waiver is given under Section 6488 if a claim therefor is filed with the board before the expiration of the period agreed upon.

Amended Stats 1977 ch 921 § 5.

§ 6903. Credit or refund for exemption under § 6401: Payment of sales tax by vendor

(a) No credit or refund of any amount paid pursuant to Chapter 3 (commencing with Section 6201) shall be allowed to any person on the ground that the storage, use, or other consumption of the property is exempted under Section 6401 unless the person establishes to the satisfaction of the board that his or her vendor has paid the sales tax to the state with respect to the sale of the property.

(b) For purposes of this section, "amount paid pursuant to Chapter 3 (commencing with Section 6201)" does not include any payment or payments made pursuant to a determination made by the board under Articles 2 (commencing with Section 6481) and 3 (commencing with Section 6511) of Chapter 5.

Amended Stats 1978 ch 1211 § 14; Stats 1982 ch 454 § 150. Amended Stats 1989 ch 768 sec 5.

§ 6904. Form and contents of claim; Claim on behalf of class of taxpayers

(a) Every claim shall be in writing and shall state the specific grounds upon which the claim is founded.

(b) A claim filed for or on behalf of a class of taxpayers shall do all of the following:

(1) Be accompanied by written authorization from each taxpayer sought to be included in the class.

(2) Be signed by each taxpayer or taxpayer's authorized representative.

(3) State the specific grounds on which the claim is founded.

Amended Stats 1987 ch 38 § 5.

Amendments:
1987 Amendment: Added (1) subdivision designation (a); and (2) subd (b).

§ 6905. Effect of failure to file claim
Cal Jur 3d Sales and Use Taxes § 23

In a consumer class action by purchasers of certain motor vehicles against the State Board of Equalization and the retailers of the motor vehicles for refund of sales taxes erroneously collected, the board was not entitled to an offset of indebtedness of individual members of the class of retailers, and thus Rev. & Tax. Code, § 6901, providing that sales taxes erroneously collected shall first be credited by the board against taxes due and the balance refunded to the taxpayer, and § 6905, providing for a similar offset against a judgment, did not bar the relief sought by plaintiffs, where the record indicated there was no issue as to the taxes due and owing from the retailers to the board, that in making viable the judicial procedure given to plaintiffs for the refund, the dealers were merely required to act as conduits for the refunds to plaintiffs and that in so doing, the position of the dealers as against the board was not adverse. Javor v State Board of Equalization (1977) 73 CA3d 939, 141 Cal Rptr 226.

§ 6906. Claim; notice of disallowance

Within 30 days after disallowing any claim in whole or in part the board shall serve notice of its action on the claimant in the manner prescribed for service of notice of a deficiency determination.

§ 6907. Interest on overpayments

Interest shall be paid upon any overpayment of any amount of tax at the modified adjusted rate per month established pursuant to Section 6591.5, from the last day of the calendar month following the quarterly period for which the overpayment was made; but no refund or credit shall be made of any interest imposed upon the person making the overpayment with respect to the amount being refunded or credited.

The interest shall be paid:

(a) In the case of a refund, to the last day of the calendar month following the date upon which the person making the overpayment, if he or she has not already filed a claim, is notified by the board that a claim may be filed or the date upon which the claim is approved by the board, whichever date is the earlier.

(b) In the case of a credit, to the same date as that to which interest is computed on the tax or amount against which the credit is applied.

§ 6908. Interest; disallowance on overpayment; waiver on deferring claim

(a) If the board determines that any overpayment has been made intentionally or by reason of carelessness, it shall not allow any interest thereon.

(b) If any person who has filed a claim for refund requests the board to defer action on the claim, the board, as a condition of deferring action, may require the claimant to waive interest for the period during which the person requests the board to defer action on the claim.

§ 6931. Prohibition against injunction or other process to prevent collection

No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action, or proceeding in any court against this State or against any officer of the State to prevent or enjoin the collection under this part of any tax or any amount of tax required to be collected.

§ 6932. Claim for refund or credit as condition precedent

No suit or proceeding shall be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally determined or collected unless a claim for refund or credit has been duly filed pursuant to Article 1 (commencing with Section 6901).

Amended Stats 1984 ch 144 § 191.

§ 6933. Right of action: Time to sue: Venue of action: Effect of delay

Within 90 days after the mailing of the notice of the board's action upon a claim filed pursuant to Article 1 (commencing with Section 6901), the claimant may bring an action against the board on the grounds set forth in the claim in a court of competent jurisdiction in any city or city and county of this state in which the Attorney General has an office for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.

Failure to bring action within the time specified constitutes a waiver of any demand against the state on account of alleged overpayments.

Amended Stats 1984 ch 144 § 192.

§ 6934. Right of action on board's failure to mail notice of action on claim

If the board fails to mail notice of action on a claim within six months after the claim is filed, the claimant may, prior to the mailing of notice by the board of its action on the claim, consider the claim disallowed and bring an action against the board on the grounds set forth in the claim for the recovery of the whole or any part of the amount claimed as an overpayment.

§ 6935. Judgment for plaintiff; credit on taxes due; refund of balance

If judgment is rendered for the plaintiff, the amount of the judgment shall first be credited on any sales or use tax or amount of use tax due and payable from the

plaintiff. The balance of the judgment shall be refunded to the plaintiff.

§ 6936. Allowance of interest

In any judgment, interest shall be allowed at the modified adjusted rate per annum established pursuant to Section 6591.5 upon the amount found to have been illegally collected from the date of payment of the amount to the date of allowance of credit on account of the judgment or to a date preceding the date of the refund warrant by not more than 30 days, the date to be determined by the board.

§ 6937. Action by assignee; recovery prohibited

A judgment shall not be rendered in favor of the plaintiff in any action brought against the board to recover any amount paid when the action is brought by or in the name of an assignee of the person paying the amount or by any person other than the person who paid the amount.

§ 18817. Franchise Tax Board's notice to withhold and transmit credits, etc., belonging to taxpayer, employer, etc.

The Franchise Tax Board may by notice, served personally or by first-class mail, require any employer, person, officer or department of the state, political subdivision or agency of the state, including the Regents of the University of California, a city organized under a freeholders' charter, or a political body not a subdivision or agency of

the state, having in their possession, or under their control, any credits or other personal property or other things of value, belonging to a taxpayer or to an employer or person who has failed to withhold and transmit amounts due pursuant to Section 18815 or 18818, to withhold, from such credits or other personal property or other things of value, the amount of any tax, interest, or penalties due from the taxpayer or the amount of any liability incurred by such employer or person for failure to withhold and transmit amounts due from a taxpayer under this part and to transmit the amount withheld to the Franchise Tax Board at such times as it may designate. However, in the case of a depository institution, as defined in Section 19(b) of the Federal Reserve Act (12 U.S.C.A. Sec. 461(b)(1)(A)), amounts due from a taxpayer under this part shall be transmitted to the Franchise Tax Board not less than 10 business days from receipt of the notice. To be effective, the notice shall state the amount due from the taxpayer and shall be delivered or mailed to the branch or office where the credits or other property is held, unless another branch or office is designated by the employer, person, officer or department of the state, political subdivision or agency of the state, including the Regents of the University of California, a city organized under a freeholders' charter or a political body not a subdivision or agency of the state.

§ 19051. Credit and refund of overpayments

If the Franchise Tax Board or the board, as the case may be, finds that there has been an overpayment of any liability imposed under this part by a taxpayer for any year for any reason, the amount of the overpayment may

be credited against any amount then due from the taxpayer and the balance shall be refunded to the taxpayer.

In the case of a joint return filed under Section 18402, the amount of the overpayment may be credited against the amount then due from both taxpayers and the balance shall be refunded to both taxpayers in the names under which the return was paid.

§ 19092. Credit and refund where judgment against Franchise Tax Board

If judgment is rendered against the Franchise Tax Board, the amount thereof shall first be credited against any taxes and interest due from the taxpayer under this part and the remainder refunded to the taxpayer by the State Treasurer on warrants drawn by the Controller.

(2)

No. 90-1400

Supreme Court, U.S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM M. BENNETT; CONWAY H. COLLIS; ERNEST J. DRONENBURG, JR.; PAUL CARPENTER; GRAY DAVIS; CINDY RAMBO; JOHN GIBBS; LUCIAN KHAN; SHEILA J. GUSTIN,
PETITIONERS,

v.

DIRECT MARKETING ASSOCIATION, INC.,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

GEORGE S. ISAACSON*
MARTIN I. EISENSTEIN
DAVID W. BERTONI
BRANN & ISAACSON
184 Main Street
Lewiston, Maine 04240
(207) 786-3566
Counsel for Respondent

Of Counsel:
JOHN MENDEZ
DOWNEY, BRAND
SEYMOUR & ROHWER
555 Capitol Mall, Tenth Floor
Sacramento, California 95814
(916) 441-0131

**Counsel of Record*

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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QUESTION PRESENTED

Whether the court of appeals correctly held that under California law Respondent did not have a "plain, speedy and efficient remedy" in California state courts because of the uncertainty of such a remedy and, therefore, that the Tax Injunction Act, 28 U.S.C. § 1341, does not bar federal court jurisdiction.

LIST OF PARTIES AND RULE 29.1 STATEMENT

Respondent Direct Marketing Association, Inc. was the plaintiff-appellant below. Respondent does not have any parent or non-wholly-owned subsidiary company required to be listed separately pursuant to Rule 29.1. Petitioners, defendants-appellees below, are William M. Bennett, Conway H. Collis, Ernest J. Dronenburg, Jr., Paul Carpenter, Gray Davis, Cindy Rambo, John Gibbs, Lucian Khan, and Sheila J. Gustin, all elected members, and officials, of the State Board of Equalization, State of California.

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DIRECT MARKETING ASSOCIATION, INC.,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

Respondent, Direct Marketing Association, Inc. ("DMA"), submits this brief in opposition to the Petition for a Writ of Certiorari filed by Petitioners William M. Bennett, *et al.* Petitioners seek review of a unanimous decision by the U.S.

Court of Appeals for the Ninth Circuit (Petition Appendix ("App."), A10-A25) reversing a judgment entered by the U.S. District Court for the Eastern District of California.(App. A9.) For the reasons set forth below, DMA urges this Court to deny the Petition.

STATEMENT OF THE CASE

DMA, a not-for-profit corporation, is the largest and oldest trade association representing companies involved in direct-to-the-consumer mail advertising and marketing. DMA's membership totals more than 3200 firms across the United States and in 40 foreign countries. A majority of DMA's members are direct marketers located outside of the State of California.

On July 18, 1988, DMA, on behalf of its non-California members, brought the instant lawsuit against Petitioners seeking prospective relief pursuant to 42 U.S.C. § 1983, as well as attorneys' fees under 42 U.S.C. § 1988. DMA alleged that Petitioners had violated its members' constitutional rights by demanding that these members collect and remit the California use tax. Such demands were made although these DMA members had no physical presence in California and communicated with their customers solely by means of the instrumentalities of interstate commerce.[1]

[1] DMA's complaint is founded upon the constitutional doctrine of "nexus" articulated by the U.S. Supreme Court in *National Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505 (1967). As the court of appeals below noted, in *dictum*, the Court in *National Bellas Hess* held that

> a state may not impose use tax collection responsibilities on a retailer that maintains no physical facilities or employees within the state, but, instead, limits its business activities to the distribution of catalogs through the United States Mail and then delivers its goods by parcel post and interstate common carriers.

(App. A14.)

On October 20, 1988, Petitioners moved to dismiss DMA's complaint on the grounds that (1) Petitioners are immune from suit under the Eleventh Amendment; (2) the Tax Injunction Act, 28 U.S.C. § 1341, divested the district court of jurisdiction; and (3) DMA lacked standing to prosecute its claims. The district court concluded that the Tax Injunction Act barred federal court adjudication of DMA's case.

The district court rejected DMA's argument that the Tax Injunction Act did not bar federal court jurisdiction because DMA's members lacked access to California state courts to resolve their claims.[2] Rather, it held that these members could wait to avail themselves of a suit for refund under California Revenue and Taxation Code ("Code") § 6902 after either (1) voluntarily collecting and remitting the use tax or (2) disobeying Petitioners' collection demands and awaiting a tax assessment (a "Notice of Determination"). (App. A5.) The district court held that while no state court remedy was actually available to DMA's members, this was a "question of ripeness" which "has no relevance to the issue of the ultimate availability to plaintiff's members of the remedy provided by the State in its courts." (App. A7.)

On October 23, 1990, the court of appeals reversed the district court's order of dismissal. The court of appeals held that it was, at best, uncertain whether any state court remedy was available to DMA members who had received use tax collection demands from Petitioners.

The court of appeals found it doubtful whether these members could file a suit for refund if they simply collected and remitted the use tax, since Code § 6902 permitted such suits only by "taxpayers." "[S]ince the use tax is levied on the con-

[2] The Tax Injunction Act, 28 U.S.C. § 1341, provides as follows:

> The districts courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such state.

sumer and the retailer is a mere collector of the tax, retailers may not seek a refund of the tax they collect and pay to the Board." (App. A16-A17.) The court of appeals quoted specifically from *Bank of America* v. *State Board of Equalization*, 209 Cal.App.2d 780, 799, 26 Cal.Rptr. 348, 359-60 (1962):

> [T]he use tax is a tax levied upon the purchaser. It is not a tax on the retailer; nor does it shift to him because he has the duty to collect it from the consumer . . . the liability of the retailer is not, therefore, for the use tax itself but for an *amount equivalent* to it because of his default in his duty as a collection agent. *The taxpayer is the person ultimately liable for the tax itself, and not the person who pays the tax liability.*

(App. A18-A19; emphasis added by court of appeals.)

The court of appeals declined to accept the claim that the taxpayer/non-taxpayer distinction was immaterial. (App. A19.) There simply had been no cases where a retailer had collected the use tax and then successfully commenced an action to recover the use tax pursuant to Code § 6902. The court of appeals also observed that

> DMA's concern that its status as a non-taxpayer renders precarious its right to seek a tax refund finds ample support in other cases. For example, with respect to the sales tax, California courts have held that the purchaser is precluded from seeking a refund because he is not considered the 'taxpayer.' *See State Board of Equalization* v. *Superior Court*, 111 Cal.App.3d 568, 570, 169 Cal.Rptr. 3, 4 (1980).

(App. A20.)

Moreover, the court of appeals based its decision on the fact that, when the Code was adopted, a clause in the predecessor statute clearly and explicitly providing a remedy for "retailers who voluntarily paid use taxes" was *deleted* (App. A22). As the court of appeals observed, "[n]o similar provision providing the retailer the right to sue for a refund in use tax cases was incorporated into the new tax code." (App. A22-A23.)

Finally, the court of appeals held that a suit for refund was not otherwise available because DMA's "members have not received [tax] determinations." (App. A17.) The court of appeals specifically rejected the notion that this was merely a question of "ripeness" since DMA members could refuse to obey Petitioners' demands and file suit after receiving a tax assessment, including an assessment of penalties and interest. The court of appeals observed that "[f]ailure to file use tax returns by DMA's members exposes them to the risk of substantial penalties, and whether or not the state will issue a determination becomes a matter of speculation." (App. A24-A25; footnote omitted.)

SUMMARY OF ARGUMENT

This petition involves only a question of construction of a California statute. Neither a constitutional issue nor a conflict among circuits is raised by Petitioner in its brief.

The court of appeals applied the Tax Injunction Act in the manner expressly prescribed by this Court. There is no legitimate claim that the court of appeals applied an improper legal standard in this case. Rather, Petitioners merely attempt to challenge the court of appeals' valid interpretation of California statutes, legislative history, and case law regarding the unavailability of a state court remedy for DMA's members and seek to have this Court rewrite the California tax code.

Petitioners' arguments boil down to the claim, without any substantiation, that the California tax code is "at least susceptible" to an interpretation that DMA's members have a state court remedy. (Petition at i.) However, the test under the Tax Injunction Act is not whether a state tax statute is "at least susceptible" to the unsupported interpretation proffered by Petitioners in their brief. To the contrary, the appropriate analysis is whether the state court remedy "is uncertain"; this was the precise test applied by the court of appeals. *See, e.g., Franchise Tax Board of California* v. *Alcan Aluminum Ltd.*, ___ U.S. ___, 110 S.Ct. 661, 667, 107 L.Ed.2d 696 (1990). The court of appeals carefully analyzed California law and concluded there was great uncertainty as to whether DMA's members had a remedy in state court.

There is no sound basis for revisiting the court of appeals' analysis of California law. In an effort to create the illusion of injustice below, Petitioners argue that this decision will "wreck havoc" on the California tax system since it will allow federal court intrusion into state tax matters. This claim of dire consequences is erroneous in several respects. First, as discussed below, the class of companies affected by the ruling is limited; it would only affect those out-of-state companies who received improper use tax collection demands. Second, the mere fact of federal court involvement is not a valid reason to deny DMA members the only forum for raising their claims. Third, the California legislature is the proper body to remedy any perceived adverse consequences by amending the tax code to provide retailers access to the California state courts to obtain a refund of use taxes collected and remitted to the state. This is only underscored by Petitioners' appeals to matters of public policy in their brief.

Petitioners also raise for the first time in this litigation the notion that "comity" precludes federal court jurisdiction. The Court has frequently stated that: "We do not address for the

first time in this Court an issue which the Court of Appeals has not addressed." *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981). Moreover, the principle of comity can only be applied where there exists a state procedure to which the federal court can and should defer. As discussed above, there is no state court remedy available to DMA's members.

As set forth in the Statement of Facts, this case concerns Petitioners' repeated demands that out-of-state mail order firms collect and remit to Petitioners the California use taxes. These companies believed that Petitioners' demands were unconstitutional; however, they faced an agonizing decision under California law. On the one hand, if they obeyed the demands and began the expensive and administratively burdensome process of collecting and remitting the tax, they would have no right to raise their legitimate constitutional objections in state court, since, as the court of appeals found, Code § 6902 limits suits for refunds to "taxpayers." On the other hand, if these out-of-state firms declined to collect the tax, they faced the possibility of "substantial penalties" if the Board ultimately decided to issue a tax assessment against them, not the least of which would be direct liability for a use tax which was actually owed by their customers. (App. A24; footnote omitted.)[1] DMA, on behalf of its members, had no option but to proceed in federal court.

[1] The specter of a contingent and uncontestable liability of in excess of six percent gross sales (*i.e.*, the use tax, together with penalties and interest), plus possible exposure to criminal penalties, can mean the difference between a profit or a loss for DMA's members. Indeed, the accrued liability, over time and prior to the possible issuance of an assessment, could force companies out of business.

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT WARRANT REVIEW BY THIS COURT BECAUSE THE SOLE QUESTION RAISED BY PETITIONERS RELATES TO AN INTERPRETATION OF CALIFORNIA LAW CORRECTLY DECIDED BY THE COURT OF APPEALS; THE COURT OF APPEALS DECISION PERMITS FEDERAL COURT JURISDICTION IN ONLY A LIMITED NUMBER OF CASES.

A. The Court of Appeals Used The Proper Standard, As Set Forth In Decisions of This Court, To Determine That The Tax Injunction Act Did Not Divest The District Court Of Jurisdiction.

The court of appeals properly applied the precedent of this Court in determining that DMA members did not have a "plain, speedy and efficient" remedy in the California state courts. This conclusion was based on the fact that California law was sufficiently uncertain as to "whether [DMA's members] have a remedy available to them." (App. A17.)

As this Court has stated, "a remedy that is uncertain or speculative is not adequate to bar federal jurisdiction." *Franchise Tax Board of California* v. *Alcan Aluminum Ltd.*, ___ U.S. ___, 110 S.Ct. 661, 667, 107 L.Ed.2d 696 (1990).[4] Indeed, it is well-established that the availability of a state remedy may be so uncertain, unclear, or speculative that it

[4] In *Alcan*, the Court refused to find the state court remedy "uncertain" since there was no authority for the plaintiff's claims that California state courts would not adjudicate foreign commerce clause issues; plaintiff itself clearly had a remedy in state court. In the instant case, DMA is not alleging that certain of its arguments might not be addressed by the state court. Rather, there is great uncertainty, on the basis of the Code, legislative history, and analogous cases, whether they could proceed in state court at all.

not constitute a "plain" remedy under the Tax Injunction Act. See *Tully* v. *Griffin, Inc.*, 429 U.S. 68, 76, 97 S.Ct. 219, 224, 50 L.Ed.2d 227 (1976) ("uncertainty concerning a state's remedy may make it less than 'plain' "); *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U.S. 101, 105-06, 65 S.Ct. 152, 154, 89 L.Ed. 101 (1944) (district court had jurisdiction due to "the uncertainty regarding the adequacy of the Connecticut remedy").

Petitioners attempt to eviscerate this clear standard by claiming that, if California law "is at least susceptible" to an unsupported interpretation that DMA members might have a remedy, the district court should be divested of jurisdiction. (Petition at i, 19.) Petitioners cite to no cases enunciating this novel test. The only relevant Supreme Court case cited in the Petition is *Franchise Tax Board of California* v. *Alcan Aluminum Ltd.*, *supra*, which, as noted above, reiterates the rule applied by the court of appeals that uncertainty of a state court remedy may defeat the application of the Tax Injunction Act.

B. Petitioners Provide No Basis For Their Request For A Ruling From This Court That The Court of Appeals Incorrectly Interpreted California Law.

The thrust of Petitioners' claims is that the court of appeals incorrectly interpreted California law regarding whether "a plain, speedy and efficient remedy" is provided to DMA's members. There is no valid reason to revisit the court of appeals' careful and correct statutory analysis.

Petitioners argue that the tax code "is at least susceptible" to an interpretation that a remedy might be available to DMA's members, and that this should be sufficient to divest the federal courts of jurisdiction. However, Petitioners fail to cite a single case that "shows that a non-taxpayer retailer who voluntarily remits use taxes to the Board can sue for a refund." (App. A23.)

As the court of appeals recognized, every case cited by Petitioner involved a retailer who had been issued a tax assessment by the Board. (App. A19.) For example, in *Holland Furnace Co.* v. *State Board of Equalization*, 177 Cal.App.2d 672, 2 Cal.Rptr. 606 (1960), the plaintiff had received an assessment. Moreover, the court in *Holland* applied an early version of Code § 6902, which did not limit remedies to "taxpayers"; the current statute limits the litigable claims to taxpayers. Finally, *Holland* involved solely the question of whether "action by the Board under Article 2 [deficiency determination] or Article 3 [determination for failure to file a return] to assert a deficiency extends the time within which the taxpayer must initiate proceedings to recover taxes." 177 Cal.App.2d at 608.

In addition, Petitioners' "interpretation" of the Code flies in the face of its legislative history and pertinent state and federal court decisions. For example, Petitioners neglect to mention that the 1941 amendment to the tax code deleted an express right of action for retailers who voluntarily collect the use tax. (App. A22.) They also fail to address analogous decisions in the sales tax area, which hold that customers cannot sue for sales tax refunds because the retailer is the "taxpayer." (App. A20.) The Tax Injunction Act was never intended to leave an aggrieved party out in the cold on the basis of Petitioners' unsupported speculation as to the mere possibility of a state court remedy.[5]

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[5] In a last ditch effort to discredit the court of appeals decision, Petitioners allege that the court of appeals erroneously reported the facts of *Ashton* v. *Cory*, 780 F.2d 816 (9th Cir. 1986) (Kennedy, J.), by stating that the vacation trust (the plaintiff) was required to file a tax return (Petition at 18). Whether tax returns are filed is immaterial to the question under the Tax Injunction Act. The court in *Ashton* correctly applied the standard that "[a] state remedy is not plain, within the meaning of the Tax Injunction Act, if there is uncertainty regarding its availability or effect." 780 F.2d at 819.

C. Petitioners' Claim Of The Purported Vast Economic And Legal Ramifications Of The Court of Appeals Decision Is Not Supported By Either The Law Or The Record; The Court Of Appeals' Decision Only Applies In A Limited Number Of Circumstances As Envisioned By The Tax Injunction Act.

Petitioners claim that the court of appeals' finding of federal court jurisdiction will have a profound impact on the state tax system. (Petition at 7-9.) The effect of the court of appeals decision, however, is limited because only a small number of companies will be able to maintain lawsuits in federal court. The Tax Injunction Act itself presupposes that a certain number of cases involving state taxes will be adjudicated in the federal courts where, as here, there is no plain, speedy and efficient state remedy.

First, the court of appeals' decision only applies to those out-of-state companies that have no presence in California but are faced with improper use tax collection demands. The vast majority of retailers subject to the authority of Petitioners are in-state retailers who are responsible for paying *sales* tax; they have no use tax collection liabilities. Since such retailers are directly liable for the California sales tax on their sales, they are "taxpayers" with a remedy under Code § 6902. *See, e.g., Javor* v. *State Board of Equalization*, 12 Cal.3d 790, 117 Cal.Rptr. 305, 527 P.2d 1153 (1974) (refund suit for sales taxes paid is not available to customer since the retailer is the "taxpayer").

Second, California court decisions reflect that the tax code provides a remedy in the vast majority of circumstances. *See, e.g., Redding Ford* v. *California State Board of Equalization*, 722 F.2d 496, 497 (9th Cir. 1983) (tax remedy available where retailer receives a determination for sales and use taxes); *Bank of America* v. *State Board of Equalization*, 209 Cal.App.2d 780, 799, 26 Cal.Rptr. 348, 359-60 (1963). Isolated cases in-

volving demands on out-of-state retailers simply do not represent a cognizable threat to the California tax system.

Finally, there is no evidence in the record to support Petitioners' ominous charge that the court of appeals decision has "vast economic and legal ramifications" for the state. (Petition at 7.) Petitioners merely speculate that certain unscrupulous retailers with "real or imagined legal challenges" will resort to federal court to challenge use tax collection demands. Petition at 9.* Given the narrow issues involved in this case, there is no credible basis for Petitioners' attempt to inflate the significance of this case to the State of California. It is beyond dispute that the Tax Injunction Act was never meant to divest the federal court of jurisdiction where no state court remedy is available, even if the result is federal court involvement in state tax matters. *Rosewell* v. *LaSalle National Bank*, 450 U.S. 503, 515 n.19, 101 S.Ct. 1221, 67 L.Ed.2d 464 (1981) (there must be an available state remedy which "provid[es] the taxpayer with a 'full hearing and judicial determination' at which she may raise any and all constitutional objections to the tax") (citations omitted).

*DMA's well-founded case should not be forced to suffer because of the possibility that some firms may press frivolous claims in federal court. DMA's case against the Petitioners is strongly supported by a long line of Supreme Court precedent holding that an out-of-state retailer cannot be compelled to collect and remit a state use tax unless it has a physical presence in the state. *See, e.g., National Geographic Society* v. *California Board of Equalization*, 430 U.S. 551, 559 (1977); *National Bellas Hess, Inc.* v. *Dep't of Revenue*, 386 U.S. 753, 756 (1967); *Miller Brothers Co.* v. *Maryland*, 347 U.S. 340 (1954). To the extent that other firms might file groundless lawsuits, there are sufficient mechanisms under the Federal Rules of Civil Procedure to deal with such parties (including motions to dismiss).

D. Even If The Decision Below Will Involve Petitioners In Additional Federal Court Litigation, It Is Up To The California Legislature To Amend Its Tax Laws To Provide A Remedy For Out-Of-State Retailers Who Have Received Use Tax Collection Demands.

Petitioners in essence ask this Court to rewrite the Code to provide a new remedy for DMA members in order to avoid federal court litigation of this case. (Petition at 9.) This is a matter for the California legislature and not the courts. Thus far, the legislature has *refused* to provide such a right of action for DMA members.

In 1941, the legislature amended Code § 6902 to *remove* the provision expressly providing a suit for refund remedy to retailers voluntarily collecting and remitting the use tax. As the court of appeals held: "No similar provision permitting a retailer the right to sue for a refund of use taxes was incorporated into the new tax code." (App. A23.) Certainly, the legislature, after careful consideration of all of the questions raised by Petitioners, should decide whether it wishes to reconsider its decision in 1941 not to provide for such a remedy to non-taxpayers such as DMA members.

E. Respondent's Members Would Have No Forum To Raise Their Valid Constitutional Claims If The Federal Court Were Divested of Jurisdiction; The Decision To Proceed In Federal Court Was The Only Rational Choice Available To DMA.

In their eagerness to obtain the dismissal of this case, Petitioners overlook the fact that there is great uncertainty whether DMA's members will be able to prosecute their claims in state court. That concern, however, is central to the issue of federal court jurisdiction.

This case was triggered by Petitioners' demands that out-of-state direct marketers collect and remit the California use tax.

These companies believed that Petitioners' demands were unconstitutional; however, they faced a difficult decision under California law. On the one hand, if they obeyed the demands and began the expensive and administratively burdensome process of collecting and remitting the tax, they would have no right to raise their legitimate constitutional objections in state court, since Code § 6902 limits suits for refunds to "taxpayers." On the other hand, if these out-of-state firms declined to collect the tax, they faced the possibility of "substantial penalties" if the Board ultimately decided to issue a tax assessment against them, not the least of which would be direct liability for a tax owed by their customers (App. A24; footnote omitted). DMA, on behalf of its members, had no option but to proceed in federal court.

F. Petitioners Have Waived The Right To Raise Principles Of Comity In Support Of Their Petition And, In Any Event, Principles Of Comity Do Not Bar Jurisdiction.

Petitioners raise for the first time in this case the notion that principles of comity should have barred the district court from adjudicating DMA's case. This Court has frequently stated that: "We do not ordinarily address for the first time in this Court an issue which the Court of Appeals has not addressed." *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 558 (1981). Petitioners offer no reason to depart from this well-established rule.

Further, principles of comity only block federal court jurisdiction in favor of state remedies "provided of course that those remedies are plain, adequate and complete." *Fair Assessment in Real Estate Ass'n, Inc.* v. *McNary*, 454 U.S. 100, 116, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981) (footnote omitted). The Supreme Court was quick to caution that

> [w]e discern no significant difference, for purposes of the principles recognized in this case [comity], between remedies which are "plain, adequate, and complete," as that phrase has been used in articulating the doctrine of equitable restraint, and those which are "plain, speedy and efficient," within the meaning of § 1341 [the Tax Injunction Act].

454 U.S. at 116 n.8 (citations omitted). Therefore, the very fact that California law provides no remedy for DMA's members is as much a defense to the "comity" argument advanced by Petitioners as is it to the application of the Tax Injunction Act.

CONCLUSION

This is simply not a case warranting Supreme Court intervention and review. It involves a decision by the U.S. Court of Appeals for the Ninth Circuit applying the Tax Injunction Act in accordance with settled Supreme Court precedent. The Petition should be denied.

Respectfully submitted,

GEORGE S. ISAACSON*
MARTIN I. EISENSTEIN
DAVID W. BERTONI
BRANN & ISAACSON
184 Main Street
Lewiston, Maine 04240
(207) 786-3566
Counsel for Respondent

Of Counsel:
JOHN MENDEZ
DOWNEY, BRAND
SEYMOUR & ROHWER
555 Capitol Mall, Tenth Floor
Sacramento, California 95814
(916) 441-0131

**Counsel of Record*